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Sent: Mon 4/28/2014 11:44:42 AM
Subject: FYI ...

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Monday, April 28, 2014

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Daily News

Kentucky Case Bolsters Bid For Local Power Plant Permits Ahead Of ELG

Posted: April 25, 2014

Environmentalists are defending a landmark Kentucky trial court ruling that backed their claims that regulators must craft site-specific permit limits for a local power plant's scrubber wastewater in lieu of EPA's pending effluent limitation guideline (ELG) for the sector, bolstering advocates' efforts in a series of similar challenges in other states.

Although any final appellate decision in *Louisville Gas and Electric Company v. Kentucky Waterways Alliance* would be binding only in Kentucky, environmentalists say it could also inform other states' decisions about whether to require "best professional judgment" (BPJ) permit reviews for scrubber wastewater -- even before EPA issues a national rule setting first-time standards for the discharges.

"This is a nationally significant precedent if it's upheld within the Kentucky state courts," one environmentalist attorney says. "For many years there was no precedent on this. Now the one state court decision on the issue is that states are required to do the BPJ analysis and set limits on [scrubber] wastewater."

Adding to the case's significance, the U.S. Chamber of Commerce recently backed the local utility's appeal, warning in an *amicus* brief that a ruling upholding the trial court's decision would upend EPA's system for controlling power plant discharges.

[The chamber's March 14 brief](#) argues the Kentucky ruling "creates unique and extreme regulatory uncertainty" and "upends a well-established national regulatory scheme." It adds that EPA's proposed ELG would allow existing sources up to eight years to meet the new standards while BPJ permit requirements would not have a similar phase-in.

"However, if the ruling below stands then Kentucky facilities will be treated differently under the BPJ regime than facilities in other states where the ELGs control," the brief says. "There will be no phase-in period, nor any guarantee

of substantive permit term equivalence."

At issue is a [state trial court ruling](#) issued last September in *Kentucky Waterways Alliance, et al. v. Energy and Environment Cabinet, et al.* that required regulators to conduct a BPJ analysis for the Trimble County plant located near Louisville, KY.

If upheld on appeal, the ruling could be especially helpful for environmentalists given that it comes after EPA received a lengthy extension, until September 2015, to finalize revisions to the ELG, which was last updated in 1982. Among other things, the new rule will set first-time discharge limits for flue gas desulfurization (FGD) units and other scrubbers that many coal-fired power plants are now required to install to comply with various EPA Clean Air Act rules.

EPA's [recently extended deadline](#) to finalize the ELG adds to the time in which its current guidelines do not contain numeric limits and technology-based treatment standards for FGD and other scrubber waste.

Potential Litigation

The final rule could also face protracted litigation -- from environmentalists or industry or both -- meaning several years of additional uncertainty. "In the meantime, there is a real need for states to be addressing this more quickly than EPA is moving," the environmentalist says.

EPA Region I also just issued a revised draft of a high-profile wastewater permit for the Merrimack Station coal-fired plant in New Hampshire, in which it proposes to use BPJ to require a zero liquid discharge (ZLD) system to treat FGD waste.

But advocates are concerned that many states are not conducting similar BPJ reviews to set treatment requirements for FGD waste. The source says it's a "mixed bag" regarding whether states agree that they must conduct BPJ reviews, with states such as Missouri and Indiana requiring the analysis while others, including Kentucky, Tennessee and Ohio, consider such reviews discretionary. Even when states do conduct the BPJ analysis, environmentalists argue there is often "slack in the permitting limits."

"We have not seen states voluntarily going to these most stringent technologies when they do the BPJ analysis," the source says. "The permits we've seen so far, while they do set some limits based on the system the company is proposing, they do not go nearly as far as the Clean Water Act [(CWA)] requires."

Part of the problem for environmentalists is that EPA is not strictly enforcing the provisions of a June 2010 guidance that requires states to establish technology-based limits for FGD and coal ash wastewater in permits issued "between now and the effective date of revised effluent guidelines."

[The memo](#), written by then-EPA wastewater chief James Hanlon, notes that "where the technology-based effluent guidelines do not address all wastestreams or pollutants discharged by the industrial discharger, EPA must establish technology-based effluent limitations on a case-by-case basis in individual [water discharge] permits, based on its best professional judgment or 'BPJ.'"

The memo says EPA is authorized to set such limits based on CWA section 402(a)(1), which authorizes limits for "such conditions as the Administrator determines are necessary to carry out" the water law.

The memo adds that states "must comply with the specific minimum federal requirements of the NPDES program," and as such "an authorized state must include technology-based effluent limitations in its permits for pollutants not addressed by the effluent guidelines for that industry."

The Hanlon memo directs regional water division managers to "work with authorized state programs to encourage them to utilize this guidance in their permit decision making process," and they should "consider using objection authorities in cases where permits do not address appropriate technology-based or water quality-based permit limits to address" FGD waste.

Though EPA has not yet objected to a permit over the lack of a BPJ analysis for scrubber waste, the agency has sent

letters to some states underscoring the issue. For example, it sent two August 2011 letters to Tennessee reiterating its view that the CWA requires BPJ-based limits because the existing ELG "did not consider" FGD wastewater.

And it reviewed eight permits issued by Maryland at the behest of environmentalists in April 2012, finding the state did not set case-by-case permit limits for the waste stream in any of the permits.

In its *amicus* brief, however, the chamber argues that "by its own terms the Hanlon Memo was 'not legally enforceable' and did 'not confer legal rights or impose legal obligations upon any member of the public, EPA, states or any other agency.'"

EPA Memo

Even if the memo has binding legal effect, the industry group notes it was issued more than a year after EPA reviewed the permit for the Trimble County plant and argues it cannot justify BPJ limits because FGD wastewater is included as a "low-volume waste" in the existing ELG and is thus covered by the rule.

But the environmentalist says "it's abundantly clear EPA did not address or intend to address FGD in the [current] ELG. They said so explicitly in the final rule." As such, the source argues the waste stream is not addressed by the national standards, prompting site-specific limits.

The chamber, however, adds that if the memo creates "new and substantively different legal obligations" it would be "unlawful 'regulation-by-guidance,'" which "circumvents" notice and comment rulemaking requirements. The court wrongly relied on the guidance in its ruling, the chamber argues, adding that upholding the ruling "will therefore result in precisely the sort of corrosive 'backdoor' regulation that courts have repeatedly rejected."

Industry has previously attacked apparent reliance on the Hanlon guide when EPA Region I first proposed FGD wastewater permit limits in 2011 for the Merrimack Station plant, arguing in comments that the policy cannot serve as a "binding norm" without undergoing notice and comment procedures.

EPA on April 18 revised its proposal for the Merrimack permit, finding that primary and secondary treatment technologies capable of operating as a ZLD system qualify as best available technology (BAT) for the facility. EPA notes that the plant had earlier voluntarily installed the technology.

Though the agency says the permit only sets BAT for the individual facility, advocates say the finding lends support to the strictest option in EPA's proposed ELG. In the permit, EPA also highlights its view that BPJ limits are required in lieu of BAT standards in the final ELG.

"If finalized, the new [ELG] would replace the BPJ, case-by-case approach for developing technology-based requirements for these wastewater streams," a fact sheet on the revised draft permit says. "Until the new [guidelines] become effective, however, EPA continues to develop BAT limits for FGD scrubber wastewater on a BPJ, case-by-case basis to facilities such as Merrimack Station."

The environmentalist says the Merrimack permit can serve as a "road map" for states, which can "take the resources that U.S. EPA has already developed and apply them." -- *Lee Logan* (llogan@iwpnews.com) This e-mail address is being protected from spambots. You need JavaScript enabled to view it)

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